IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DANNY M. SKINNER, Plaintiff, v. E.I. DUPONT DE NEMOURS AND COMPANY, INC.; E.I. DUPONT DE NEMOURS AND COMPANY Plan Administrator; PENSION AND RETIREMENT PLAN; HOSPITAL AND MEDICAL-SURGICAL PLAN; DENTAL ASSISTANCE PLAN; NONCONTRIBUTORY GROUP LIFE INSURANCE PLAN; CONTRIBUTORY GROUP LIFE INSURANCE PLAN; TOTAL AND PERMANENT DISABILITY INCOME PLAN; SAVINGS AND INVESTMENT PLAN; TAX REFORM ACT STOCK OWNERSHIP PLAN, Defendants.	)	Civil Action No. 92-147-SLR

John M. Stull, Esquire, Wilmington, Delaware. Counsel for plaintiff.

Gretchen Ann Bender, Esquire of Morris, James, Hitchens & Williams, Wilmington, Delaware. Counsel for defendants. Of counsel: Evelyn H. Brantley, Esquire of E.I. DuPont De Nemours & Co., Inc., Wilmington, Delaware.

OPINION

Dated: October 29, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Danny M. Skinner filed the above captioned lawsuit on February 21, 1992 against defendants E.I. DuPont de Nemours and Company, Inc. ("DuPont") and various of its employee benefit plans, claiming generally that defendants violated the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq., ("ERISA"), by denying his application for disability benefits. Over the course of the next eight years, the case was removed to this court from the state court, remanded twice to DuPont's Board of Benefits and Pensions (the "Board"), and survived three rounds of summary judgment proceedings before three different judges. A bench trial ultimately was conducted on September 11, 12 and 20, 2000. The court's findings of fact and conclusions of law follow.

Jurisdiction vests in this court pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). Venue is proper pursuant to 29 U.S.C. § 1132(e)(1), all parties either residing in or being found in Delaware.

II. FINDINGS OF FACT

1. Plaintiff was employed by DuPont at its nylon plant in Seaford, Delaware from June 1973 to March 1989.

2. In 1981, plaintiff underwent surgery to have a herniated disc removed. (Ex. 2)

3. Plaintiff suffered an on-the-job injury on September 13, 1988. He was given six months of benefits under DuPont's short term disability plan, amounting to continuation of his pay, from September 13, 1988 until March 31, 1989, the date of his termination.

4. In December 1988, it was determined that plaintiff had a herniated disc or scarring at the L4-5 level, and a herniated disc at the L5-S1 level. (Exs. 9, 16, 17) Plaintiff was "not enthusiastic about undergoing another surgery;" therefore, physical therapy and analgesics were the only treatment prescribed. (Ex. 4)

5. On or about February 14, 1989, plaintiff applied for long term benefits under DuPont's Pension and Retirement Plan ("Incapability Retirement") and under the Total and Permanent Disability Income Plan ("T&P Plan").

6. An employee is eligible for incapability retirement benefits if the Board "finds that he has become, for any reason, permanently incapable of performing the duties of his position with the degree of efficiency required by the Company, and he has at least 15 years of service." (Ex. 52)

7. An employee is eligible for benefits under the T&P Plan if "his service is terminated because of total and permanent disability." (Ex. 53) Under the T&P Plan, the employee must be

permanently incapable of working at any gainful employment at the time of his termination. (D.I. 175 at 8)

8. The application procedure for both plans is described as follows:

a. An employee submits an application, along with any supporting medical information, to his site benefits administrator. The application package is then assembled by the site, which is required to submit its recommendation.

b. The application is then forwarded to the corporate pension group for a pension calculation, and then to the medical group for a medical recommendation.

c. The entire package from the employee is submitted to a delegate of the Board (in plaintiff's case, the delegate was called the Case Determination Committee ("CDC")), for review and determination.

d. The delegate renders a written decision to the employee, who has the opportunity to appeal the decision to the Board.

e. On appeal, the Board reviews the package submitted to the delegate, as well as any additional materials submitted by the employee.

f. If the Board denies benefits, it renders a written decision to the employee, who can thereafter file a lawsuit challenging the Board's denial decision.

(D.I. 175 at 9-10; D.I. 178 at 7-11; D.I. 169 at 3-4)

9. On February 3, 1989, plaintiff was examined by the plant physician, Dr. Jensen. Dr. Jensen opined that, even with surgery, plaintiff "will have a degree of impairment which will restrict him from any jobs he is qualified by training and experience to hold on this plant site." Dr Hay of DuPont's medical division disagreed, opining that plaintiff's prognosis "for performing activities of work is good, avoiding repetitive bending or lifting activities and permitting employee to sit, stand or walk as comfort dictates." (Ex. 10)

10. On February 14, 1989, the plant manager, W.P. Wilke, opined that plaintiff could not perform his job as tow cut operator, or any other job at the plant, with an acceptable level of safety and efficiency, based on his medical history, his present medical problems, and his level of education, skills and training. (Ex. 12)

11. On March 2, 1989, Dr. Hay advised that, although plaintiff could not currently perform his regular job as a tow cut operator, "there is no credible objective evidence to support a conclusion that he is permanently disabled from performing the activities of a tow cut operator." (Ex. 14)

12. On March 10, 1989, plaintiff underwent surgery. (Exs. 18, 19)

13. On March 13, 1989, the CDC met and concluded, based on evidence submitted by the medical group, that plaintiff was currently incapable of performing his job, but that his condition should improve with surgery. The CDC, therefore, recommended that plaintiff's request for benefits under the incapability retirement pension plan be denied: "There is no objective medical evidence that he is permanently unable to perform the job of tow cut operator with the degree of efficiency required by the Company; therefore, he is not eligible to an Incapability Pension." (Exs. 20, 21)

14. The CDC shared its decision with plaintiff by letter dated March 23, 1989, noting in explanation that plaintiff's "recent surgery should relieve the symptoms and impairment" of his chronic back pain. (Ex. 23)

15. By letter dated May 5, 1989 from Dr. Hay to the Compensation and Benefits Division, Dr. Hay reiterated his opinion that "surgical intervention ... could reasonably be anticipated to relieve the signs and symptoms of nerve root compression that was disabling" plaintiff. Absent evidence provided by his physicians "to indicate that their surgery failed to relieve the pressure on the affected nerves or that there was a complication to the surgery," there is no evidence to suggest that plaintiff "is permanently incapable of performing activities of available work at the time of termination." (Ex. 26)

16. Plaintiff appealed the CDC's determination. (Exs. 27, 28)

17. By letter dated June 19, 1989, the Board denied plaintiff's appeal:

> The Board found that you have been bothered by chronic back pain for a considerable period of time. However, you had appropriate surgery in March 1989 and the medical data submitted by you indicates no complications and that everything is progressing as it should. Therefore, it is the Board's opinion that while you are unable to work while recovering from surgery, there was no information presented that supports a conclusion that you are permanently incapable of performing the duties of a tow cut operator with the degree of efficiency required by the Company.

(Ex. 30)

18. By letters dated June 23, 1989 and July 19, 1989, plaintiff's treating physicians opined that plaintiff was limited to light duty work, that is, work that does not involve kneeling, bending, pushing, pulling or lifting anything heavier than 25 pounds. (Exs. 31, 32)

19. In June 1990, Dr. DuShuttle opined that plaintiff had a 20% permanent partial impairment of the whole person, which computed to a 34% impairment of the spine. (Ex. 33)

20. By November 1990, plaintiff was described by Dr. Arminio as having pain that radiates into the lower extremities and a 30% impairment to his low back. (Ex. 34)

21. A May 21, 1992 examination by plaintiff's treating physician, Dr. DuShuttle, notes back pain radiating down the right leg. Dr. DuShuttle opined that plaintiff was disabled and unable to work "for an undetermined amount of time." (Ex. 36)

22. An April 23, 1993 report from a vocational specialist noted that the duties of a tow cut operator included light to medium level tasks. Therefore, if plaintiff were limited to sedentary work, he could not perform his past job. (Ex. 37)

23. By September 1993, Dr. DuShuttle opined that plaintiff had a permanency rating of 30%. (Ex. 38)

24. By letter dated September 21, 1993, Dr. DuShuttle opined that plaintiff would never "be able to return to his regular occupation. He is capable of performing sedentary work only. . . ." (Ex. 39)

25. An October 7, 1993 evaluation by the State of Delaware, Department of Labor, Division of Vocational Rehabilitation, suggested that plaintiff's ability to engage in sedentary occupations is compromised by chronic pain, chronic depression, and a learning disability. (Ex. 40)

26. In January 1994, plaintiff was admitted to the emergency room at Kent Memorial Hospital complaining of constant pain. Medication was prescribed. (Ex. 41)

27. In 1994, upon remand from this court, the Board again reviewed plaintiff's application for disability benefits and again denied plaintiff's application. (D.I. 78; Exs. 44, 51)

28. In April 1998, Dr, DuShuttle reiterated his opinion that plaintiff was incapable of performing the duties of a tow cut operator and was capable only of performing sedentary work. (Ex. 47) Dr. Arminio evaluated plaintiff as having no ability to lift anything above 10 pounds, reach or work above the shoulder, stoop, kneel, bend repeatedly, or climb. (Ex. 49)

29. According to a May 1998 report by Dr. Arminio, plaintiff was on a pain management program which consisted of the use of heat; alternate use of Paxil, Ultram and Elavil for sleep, and occasionally use of Percocet for pain relief; and aquatherapy. Plaintiff reported that he had learned how to maneuver his body when performing activities in order to avoid certain movements which aggravate pain. (Ex. 50)

30. In 1998, upon remand by this court, the Board once again reviewed plaintiff's application for disability benefits and once again denied plaintiff's application. (D.I. 143; Ex. 51)

31. The Board considered plaintiff's application for long term disability benefits three times and concluded each time that plaintiff was not eligible: "At the time of his termination, [plaintiff] had had surgery, and there was every expectation that

the surgery would be successful, to the extent that he would be permitted to perform his job," that of tow cut operator, a light-duty type job. The Board based its conclusion "on Dr. Hay's analysis and his experience with this type of surgery and his expectation that the surgery would be successful, to the extent that [plaintiff] would be able to perform the tow cut operator job." (D.I. 178 at 19-22, 35)

32. The job of tow cut operator includes the following responsibilities and duties, in addition to the general duty of operating the machine (the "cutter") that cuts nylon yarn into lengths as specified by a customer:

a. Inspect the yarn as it goes into the cutter. This is considered a sedentary activity.

b. String up the cutter. This occurs on average once a week and requires some ergometric force to accomplish.

c. Removing knots. This occurs on every shift, although the frequency varies from once per shift to as often as 25/50 per shift, and involves repetitive action.

d. Changing knife blades. This occurs on average three times per week and involves standing on a stool, working at chest height, rotating the cutter reel, and using some force to free the knife blade from the retainer ring.

e. Removing yarn jams at the cutter chute. This occurs on average twice per shift, involves an awkward position

(on hands and knees or stooped over), and can take up to 30 minutes to complete.

f. Removing wraps. This occurs on average twice per shift. Whenever a wrap occurs, the operator must remove the wrap by shutting down the cutter, locking out and cleaning up the equipment. This may require walking up and down steps.

g. Clean cutter and yarn chute. This occurs several times a week (as products change), involves awkward positions (on hands and knees, bending, stooping, flexing and twisting of one's back to get into some places), and can take as long as 30 to 45 minutes.

h. Obtaining and checking samples. This occurs on average 80 times per shift and involves reaching into the cutter housing from a stooped over position to obtain the sample.

i. Emptying the waste container. This occurs on average once per shift and involves carrying the 25 to 30 pound container a maximum distance of 30 yards. Alternatively, the operator can take the waste off the machine and hand carry it to the chute.

j. Pick up bales from conveyor. This occurs infrequently (estimate of only three times per year) and involves picking up yarn (30 to 40 pounds at a time) until a 725 pound bale has been removed from the conveyor.

k. Removing 2.5 gallon waste finish buckets from the cutter level. This occurs no more frequently than once every 24 hours and involves carrying a 20 pound bucket down three flights of stairs for disposal.

l. On average, an operator goes up and down three flights of stairs 10 times per shift.

(D.I. 172 at 70-81; Exs. 1-A, 1-B, 45)

33. DuPont has a policy of approving a team approach to work; i.e., a team of people work to accomplish a range of responsibilities, allowing employees who are unable to perform all aspects of a job to continue working on those portions they are able to perform. (D.I. 172 at 82)

34. There were no such team arrangements, however, at the Seaford nylon plant. (Ex. 12)

35. The tow cut operator job is a light-duty type job.

36. Prior to his September 1988 injury, plaintiff was marginally performing his responsibilities as a tow cut operator.

37. Upon his termination from employment on March 31, 1989, plaintiff lost all of his benefits in the other DuPont welfare plans, significantly, under the medical plan. Plaintiff paid health insurance from April 1989 through approximately August 1992. (D.I. 172 at 58-66; Plaintiff's Ex. A)

III. CONCLUSIONS OF LAW

1. A court reviewing the denial of pension benefits under

ERISA must employ the "arbitrary and capricious" standard when the pension plan commits discretion to the plan administrator or fiduciary. Under that standard, the court "must defer to the plan administrator unless the administrator's decision was 'without reason, unsupported by substantial evidence, or erroneous as a matter of law.'" Skretvedt v. E.I. duPont de Nemours and Company, Inc., No. 00-2918, 2001 WL 1185796, at *4 (3d Cir. Oct. 5, 2001) (quoting Abnathya v. Hoffman-La Roche, Inc., 2 F.3d 40, 45 (3d Cir. 1993)).

2. Consistent with the parties' agreement, the court will restrict its review to plaintiff's challenge of the Board's November 16, 1998 denial. (D.I. 169 at 2)

3. Despite when the review occurred, the standard has remained whether, at the time of plaintiff's termination, he was permanently unable to perform the job of tow cut operator.

4. The Board's 1998 decision was based on the opinion of Dr. Hay that surgery without complications would enable plaintiff to perform the tow cut operator job.[1]

[1]Indeed, Dr. Hay's analysis formed the basis for each of the Board's decisions.

5. The undisputed medical evidence[2] demonstrates that plaintiff is permanently incapable of performing the duties of the tow cut operator position with the degree of efficiency required by DuPont.[3]

6. Defendants' contention that plaintiff could perform the duties of the tow cut operator position with the assistance of others is not persuasive, given the evidence that the Seaford nylon plant does not accommodate employees with physical limitations. More significantly, the language of the Incapability Retirement pension plan does not except from eligibility those employees who can perform the duties of their position "with the help of others."

7. Therefore, it is the court's conclusion that the Board's 1998 decision to deny plaintiff's application for benefits under DuPont's Pension and Retirement Plan was without reason or unsupported by substantial evidence.

8. Nevertheless, the court further concludes that plaintiff's lawsuit is time barred by the one-year statute of

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[2]Defendants contend that physician opinions, absent treatment notes and test results, are not compelling. The court agrees that such evidence is less compelling than treatment notes and test results, but certainly such opinions are entitled to some weight, especially in the absence of any other medical evidence.

[3]This conclusion is supported by the evidence of record that plaintiff was marginally performing his duties before his 1988 surgery.

limitations applicable to plaintiff's claim for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).[4] See Syed v. Hercules, Inc., 214 F.3d 155, 160-61 (3d Cir. 2000).

a. The Board issued its first denial by letter dated June 19, 1989.

b. Plaintiff filed his lawsuit in state court on or about February 21, 1992, more than one year after the Board's decision.

IV. CONCLUSION

Because plaintiff's lawsuit is barred by the statute of limitations, judgment shall be entered in favor of defendants and against plaintiff. An appropriate order shall issue.

[4]The court notes that defendants raised the statute of limitations as an affirmative defense in their answer to both the complaint and the amended complaint. The issue apparently was not raised (or at least not addressed), however, in any of the prior summary judgment proceedings, resulting in this protracted proceeding.

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O R D E R

At Wilmington this 29th day of October, 2001, consistent with the opinion issued this same day;

IT IS ORDERED that the Clerk of Court shall enter judgment in favor of defendants and against plaintiff.

United States District Judge